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No. 07-141

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PUBLIC CITIZEN,
Petitioner,

v.

CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

REPLY BRIEF FOR PETITIONER

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The government does not dispute that the text of S. 1932 as engrossed in the Senate and transmitted to the House for consideration differed substantively from the version of S. 1932 transmitted to the President for his signature. The government also does not dispute that, in accordance with statutory and House procedures, the only Senate bill on which the House can vote is an engrossed bill. And the government concedes that, if the House did not vote on the version of S. 1932 that was signed by the President, that bill would not have been constitutionally enacted. The government nonetheless argues that certiorari should be denied, primarily for three reasons.

1. First, relying on *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), the government argues that this Court cannot look at the indisputable evidence at all. In making this argument, the government quotes selectively from *Marshall Field*, but pays little attention to the context of the case or, in particular, the evidence on which the *Marshall Field* plaintiffs focused. In *Marshall Field*, the plaintiffs had argued that journals offered the "best, if not conclusive, evidence" of the content of bills. *Id.* at 672. In fact, the "clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress" was the Journal Clause. *Id.* at 670. Yet there is no requirement that the text of a bill be set forth in the journals. The fact that the Constitution's journal requirement is not tied to the requirements for the passage of legislation was thus fatal to the plaintiffs' claim that the content of the journals proved the defect in the statute. *See United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990) (explaining that *Marshall Field* rejected the argument that "whether a bill had passed must be determined by an examination of the journals"). By contrast, the evidence at issue here is the engrossed and enrolled bills created and printed pursuant to 1 U.S.C. § 106, which establishes procedures for enacting legislation—precisely the connection between the evidence and the legislative process that was absent in *Marshall Field*.

The government argues that, if the journals that the Constitution requires to be kept cannot be used to impeach an enrolled bill, then nothing can. That argument shows a lack of understanding about the journal requirement. As *Marshall Field* explains, the Constitution's requirement for the keeping of journals is unrelated to its requirements for passing legislation. 143 U.S. at 671. The Constitution does not even require that journals include the text of bills. *Id.* For this reason, journals are not appropriate evidence to prove the content of bills. In contrast, an engrossed bill is not simply tied to the enactment of legislation—it *is* the legislation.

The government points out that the *Marshall Field* plaintiffs presented exhibits in addition to the journals. *See also* Pet. 15 n.6. However, the opinion in *Marshall Field* makes clear that the plaintiffs' ability to prove their case turned on their argument about the significance of journal entries. The plaintiffs' claim was that a section that was included in the conference report passed by both Houses was omitted from the enrolled bill. The conference report was printed in the journals, which were offered as evidence of the report. *See, e.g.*, Reply Br. of Appellants in *Marshall Field*, No. 1052, at 50-51 (making this point and directing the Court to an appendix to the government's brief, which reproduced relevant journal entries). As the Court explained, the plaintiffs "assumed in argument that the object of [the Journal] clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress." 143 U.S. at 670; *see id.* ("The clause of the constitution upon which [plaintiffs] rest their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings . . . .'"). For this reason, it is not surprising that the journals are the only evidence discussed in the Court's opinion.

The government's argument gives short shrift to the Supreme Court's much more recent description of *Marshall*

Field. In its 1990 decision in *Munoz-Flores*, the Court explained that, under *Marshall Field*, courts cannot rely on the content of legislative journals to determine whether a law was constitutionally enacted because the duty to keep a journal does not bind Congress with respect to the enactment of laws. However, where a case concerns a constitutional requirement binding Congress with respect to the enactment of laws, "[*Marshall*] *Field* does not apply." 495 U.S. at 391 n.4.

Declining to posit an alternative reading of *Munoz-Flores*, the government rests on its view that petitioner's reading is incorrect. The government then contends that the Court "confirmed" a broad reading of *Marshall Field* in a later case, *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439 (1993). As discussed in the petition (at 18 n.7), *National Bank of Oregon* did not involve or even discuss an "enrolled bill rule" and cited *Marshall Field* for an uncontroversial point. 508 U.S. at 455 n.7.

2. Second, the government suggests that the facts in this case are subject to dispute. There is, of course, no contesting that the engrossed bill presented in the House and the enrolled bill signed by the President were substantively different. Nonetheless, the government suggests that perhaps the House did not vote on the bill before it. It offers no theory, however, as to what else the House might have been voting on, and it acknowledges (at 13) that the only Senate bill on which the House can vote is an engrossed Senate bill. *See* 1 U.S.C. § 106; 7 *Deschler's Precedents of the U.S. House of Reps.* (House Doc. No. 94-661), ch. 24, § 12 at 4889, § 3343 at 805, *available at* http://origin.www.gpoaccess.gov/precedents/deschler/browse.html. The engrossed Senate bill was the only version of S.1932 before the House on February 8, 2006. The government's contention that the facts are open to dispute is not credible and provides no reason for denying review.

3. Finally, the government argues that an "enrolled bill rule" establishing an irrebuttable presumption that bills sent by

Congress to the President were passed in accordance with constitutional requirements is good policy. Policy arguments, however, cannot override article I, section 7, clause 2's bicameralism requirement. In any event, the certainty and stability that the government seeks are best achieved through rigorous enforcement of the Constitution's requirements for enacting legislation, not by overlooking those requirements when the Executive or Legislative Branch finds it convenient to do so.

The government argues that, on the one hand, if few bicameralism violations occur, this constitutional provision need not be enforceable. The notion that the Court should turn a blind eye to constitutional violations as long as Congress and the Executive Branch do not abuse their "right" to commit them is repugnant to our system of government and the rule of law.

On the other hand, the government states that, if bicameralism violations are frequent, then the "reliance interest" in being able to assume the validity of enacted legislation should override the public interest in legislation being constitutionally enacted. This statement also shows striking disregard for a fundamental constitutional requirement. Although petitioner agrees that both the public and the government need certainty with respect to the status of enacted legislation, that interest is best served by enforcing procedures intended to assure compliance with the bicameralism requirement and by speedy resolution of the constitutional question when it arises, not by side-stepping the question altogether.

Unfortunately, the decisions in the cases challenging the Deficit Reduction Act seem already to have emboldened some lawmakers to manipulate the legislative process to circumvent the "unenforceable" bicameralism requirement. *See* E. Bolstad, *Young Accused of Changing Bill After Vote*, Anchorage Daily News, Aug. 10, 2007, *available at* www.adn.com/news/alaska/story/9208373p-9124529c.html (after bill's passage, lawmaker or his staff changed earmark for general road-widening project to one that benefitted a specific interchange opposed by many

local officials but desired by developer with ties to frequent contributor to lawmaker). The official documents printed pursuant to 1 U.S.C. § 106 allow such situations to be identified with certainty, yet without this Court's intervention, "laws" that were demonstrably not validly enacted will remain in force.

If the Court rules that a bicameralism violation cannot be tolerated, the number of such violations will likely be fewer than otherwise. Congress and the President can be expected to correct such errors in the future, before purporting to enact the bill into law. Procedures for making such corrections already exist. *See* 109th House Rules and Manual, House Doc. No. 108-241, § 565 at 296-97 (2005), *available at* www.gpoaccess.gov/hrm/browse_109.html. They simply were not used here.

Thus, petitioner agrees with the government that it should be left to Congress to determine in the first instance what bills have passed its chambers. The "enrolled bill rule" does not do so, however. Rather, it allows individual members of Congress or a congressional clerk to thwart Congress's will, which under the Constitution is expressed through the votes of each chamber on the legislation before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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